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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TRACY LEEAN GARRISON, Defendant and Appellant.	E072645 (Super.Ct.No. RIF095477) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Meredith S. White and Robin Urbanski, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

In 2018, the Legislature passed and the Governor signed into law Senate Bill No. 1437 (Senate Bill 1437), legislation that prospectively amended the mens rea requirements for the offense of murder and restricted the circumstances under which a person can be liable for murder under the felony-murder rule or the natural and probable consequences doctrine. (Stats. 2018, ch. 1015, § 4.) Senate Bill 1437 also established a procedure permitting certain qualifying persons who were previously convicted of felony murder or murder under the natural and probable consequences doctrine to petition the courts that sentenced them to vacate their murder convictions and obtain resentencing on any remaining counts. (*Ibid*.; see Pen. Code,[1] § 1170.95)

Defendant and appellant Tracy Leean Garrison appeals from an order denying her petition to vacate her first degree murder conviction in which she aided and abetted codefendant Joshua Blaine Wahlert and obtain resentencing under the procedures established by Senate Bill 1437. Garrison argues the trial court erred in summarily denying her petition without first appointing her counsel, issuing an order to show cause, or holding a hearing. She also contends her due process rights were violated when the trial court erroneously relied on a materially inadequate record to reach its unsupported findings. We reject these contentions and affirm the postjudgment order denying Garrison's section 1170.95 petition.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

II

FACTUAL AND PROCEDURAL BACKGROUND[2]

Wahlert lived in a recreational vehicle on property belonging to the father of his friend, Jon Ramirez. Ramirez and his father lived in a house on the property. In the months preceding the murder of Michael Willison, Garrison stayed intermittently with Wahlert in the recreational vehicle. The two frequently argued and Garrison would leave for several days at a time to be with Willison. According to Ramirez, Garrison was confused about who she wanted to be with. (*Wahlert I*, *supra*, E035174, at p. 5.)

Two or three weeks before Willison was killed, Ramirez, Garrison, and Willison went to the home of "Flako" to buy drugs. While Willison was inside Flako's house, Garrison talked to Ramirez about a plan to rob Willison. She said she wanted to give Willison's truck and other property to Wahlert and then the two would go to Las Vegas to get married. She spoke to Ramirez about this plan on two other occasions. Wahlert separately told Ramirez of his desire to "take everything that [Willison] had." Another time, Wahlert, who was jealous of Willison's relationship with Garrison, said he wanted to "beat [Willison] up." Wahlert and Garrison sometimes referred to each other as "Bonnie and Clyde." (*Wahlert I*, *supra*, E035174, at p. 5.)

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[2] The factual background is taken from this court's partially published opinion in defendant's prior appeal, case No. E035174. (*People v. Wahlert* (June 24, 2005, E035174) [partial pub. opn.] (*Wahlert I*).) We took judicial notice of the appellate record of Garrison's and Wahlert's criminal trial, case No. E035174. (Evid. Code, § 452, subd. (d).)

On January 14, 2001, Willison called Ramirez to get some help getting a couch from storage into his truck. Willison arrived at Ramirez's home about 10:30 p.m. that night. The two smoked methamphetamine. As Ramirez was putting his shoes on to leave with Willison, Wahlert and Garrison entered Ramirez's home. Garrison brought in a roll of duct tape and set it on the television set. Wahlert pulled out a gun and pointed it at Willison. When Willison pleaded to spare his life and to not "leave [his] two boys fatherless," Wahlert told him to shut up and stuck a bandana in Willison's mouth. Garrison then taped Willison's mouth and hands with the duct tape. She went through Willison's pockets, taking keys, a wallet, a necklace, and a ring, and threw them on a couch. Ramirez was, as he said, "[f]reaking out" and telling them, "No, not here." Ramirez testified that he did not do anything to encourage them; but he did not do anything to stop them "[b]ecause [Wahlert] had a gun." According to Ramirez, Wahlert never turned the gun toward Garrison, threatened her, forced her, or directed her to do anything. It appeared to Ramirez that Wahlert and Garrison were "working together." (*Wahlert I, supra*, E035174, at pp. 5-6.)

Garrison took Willison's keys. With Wahlert pointing the gun at Willison, the three went to Willison's truck. They drove to a secluded rural area where Willison was severely beaten, repeatedly stabbed, and shot twice in the head. He died as a result. (*Wahlert I, supra*, E035174, at p. 6.)

Wahlert and Garrison returned to Ramirez's house in Willison's truck about 20 minutes after they had left with Willison. Ramirez told them "to get their stuff and to

leave." Wahlert told Ramirez he was "sorry for letting that happen," gave Willison's ring and necklace to Ramirez as "compensation to help you out for what went on," and told him, "[d]on't say a word." Wahlert took Willison's other property, including a $20 bill and credit cards. Wahlert told Garrison to pack their belongings, which she did. The two then left in Willison's truck. (*Wahlert I*, *supra*, E035174, at pp. 6-7.)

Later that morning, they tried to buy gas for the truck with one of Willison's credit cards, but the card was not approved. When the gas station attendant went to call the police, Wahlert and Garrison left. (*Wahlert I*, *supra*, E035174, at p. 7.)

Wahlert and Garrison drove the truck to the home of Ed and Donna Geiger, where Vernon Wood was staying. Wahlert told Wood that he had taken the truck "from a dude that he killed." He told Wood that he intended "to rob the guy . . . and stuff got out of hand and he shot him, stabbed him[,] and split." Wahlert showed Wood credit cards with the name "Michael" on them. Wahlert asked Wood to help him bury the victim, but Wood refused. He also asked Wood where he could get a 50-gallon drum. Wahlert left a bag of clothes at the house, which Ed Geiger later burned. (*Wahlert I*, *supra*, E035174, at p. 7.)

A couple of days after the murder, Wahlert called Ramirez to say that he and Garrison were going to Las Vegas to get married and asked Ramirez to be the best man. Later, Wahlert told Ramirez that he had shot Willison in the head and put a tarp over him. He also told Ramirez where the body was located and asked Ramirez to "take care of the body." (*Wahlert I*, *supra*, E035174, at p. 7.)

On January 20, 2001, Wahlert and Garrison were in Willison's truck when Wahlert displayed a gun to two women in another car. One of the women called her husband, who called 911. Shortly afterward, Wahlert was arrested for brandishing a firearm. The police found a .30-caliber gun in the truck and a live round in Wahlert's pocket. While being booked on this charge, Wahlert commented: "I'm looking at 60 years, they just haven't found out the half of it yet." (*Wahlert I, supra,* E035174, at pp. 7-8, fn. omitted.)

In a subsequent search of the truck, police found, among other items, a pair of blue jeans stained with Willison's blood, a man's empty wallet, a black bag, and a red bag. In the black bag were checks on Willison's personal bank account, a payroll check made out to Willison, and business cards for Willison's painting business. The red bag contained credit cards in Willison's name and a bandana. (*Wahlert I, supra,* E035174, at p. 8.)

A couple of days after Wahlert's arrest, Garrison went to Ramirez's house and told him that they had to "go back out there and take care of the body." (*Wahlert I, supra,* E035174, at p. 8.)

On January 23, 2001, nine days after the murder, Willison's body was found by a jogger. The body was covered with a tarp or mat. Police found a piece of duct tape 20 to 30 feet away from the body. Impressions of tire tracks at the scene matched those of the tires on Willison's truck. After identifying the victim as Willison, police learned that Willison's car had been impounded in connection with the arrest of Wahlert for brandishing a firearm. The police then examined the property that was taken from

Wahlert when he was arrested and found Willison's social security card, his contractor's state license card, and credit cards with Willison's name on them. (*Wahlert I, supra*, E035174, at pp. 8-9.)

While Wahlert was in custody on the charge of brandishing the firearm, Kevin Duffy, an investigator for the Riverside County Sheriff's Department, interviewed him about Willison after he was advised of, and waived, his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. Audiotaped recordings of these interviews were played in the presence of his jury only. Wahlert admitted shooting Willison twice, but stated that he did so after Willison came at him waving a shotgun in his arms. After shooting Willison, Willison grabbed Wahlert; Wahlert then stabbed Willison. Initially, he stated that Garrison was not there and did not participate in the killing. Later, he said that Garrison was there, but that she did not know or do anything. During one of the interviews, Wahlert wrote a note to Willison's children at the request of the investigator, in which Wahlert apologized "for the pain that [he has] caused . . . ." (*Wahlert I, supra*, E035174, at p. 9, fn. omitted.)

While Wahlert was being interviewed in the district attorney's office, Garrison was being questioned by an investigator at a sheriff's station in Hemet. According to Garrison, she, Wahlert, Willison, and Ramirez were in Ramirez's house when Wahlert pulled a gun on Willison and had Willison empty his pockets. Wahlert then told Willison they were "gonna go for a ride." Garrison said that she insisted on going with them. After driving to a secluded location, Wahlert and Willison walked to a rocky area and

argued. As Garrison started to get out of the truck, she heard two shots; then Wahlert returned and told her to get into the truck. Sometime later, they returned to the scene to find that Willison had moved about six feet and was alive. Wahlert then took a knife and walked toward Willison; when he returned, he told Garrison that he had cut Willison's throat and broke his neck. Video and audio recordings of this interview were played only to the Garrison jury. (*Wahlert I, supra*, E035174, at pp. 9-10, fn. omitted.)

During the day that both Wahlert and Garrison were being separately interviewed, Duffy, who was interviewing Wahlert, and the investigator interviewing Garrison, remained in "constant phone contact" with each other and arranged for Wahlert to telephone Garrison. The telephone call was described by Duffy at trial as a "pretext call." Duffy informed Wahlert that they "found [Garrison]" and that Wahlert "need[s] to talk to her and tell her to cooperate and tell the truth." Duffy told Wahlert that Garrison was in Hemet. Wahlert asked if she was "at the station," to which Duffy responded, "No, . . . some other house." Duffy then dialed a number on a cell phone and handed the phone to Wahlert. Wahlert was then connected with Garrison in the Hemet sheriff's station as Duffy left the room. In Hemet, an investigator was in the room with Garrison listening to the phone call and "feeding her some questions at times." The phone call was recorded and the recording played to each jury separately. (*Wahlert I, supra*, E035174, at pp. 10-11, fns. omitted.)

During the call, Wahlert and Garrison each made statements directly or indirectly implicating themselves and each other. When Wahlert told Garrison that he had told

Duffy that Willison "pulled a shotgun on" him, Garrison told him that she would "tell [them] the truth before I told [them] that." Wahlert admitted that he had lied "to keep [Garrison] safe." Wahlert told Garrison that she was "part of this" and, when Garrison said that she "told them everything that happened from the time we left [Ramirez's]," Wahlert asked, "Did you tell them you told me to do it?" When Garrison denied that she told Wahlert "to do it," Wahlert responded, "Oh, ho! That's cold. All right." Later in the conversation, Wahlert told Garrison that he would "take the fall for this." Still later in the conversation, there was an exchange that suggested that Wahlert killed Willison because Garrison said she was afraid of Willison. When Garrison denied that she was afraid of Willison, Wahlert declared, "My life's over because I cared about you." Garrison responded by telling Wahlert, "Well then you shouldn't have done it" and that he "should've thought about that before." Wahlert warned Garrison that the police wanted to "make [her] an accessory," to which Garrison explained, "[t]he only thing I did, is I was there." (*Wahlert I, supra,* E035174, at pp. 11-12.) The following exchange then took place:

"WAHLERT: And you didn't tell me to shoot him?

"GARRISON: Nope!

"WAHLERT: Oh, ho-oh! You don't love me, do you?

"GARRISON: You know what does that have to with thing [sic]. I do love you. But I never told you, I never told you to do anything. . . . I never told you to kill him. I never told you to shoot him.

"WAHLERT: OOOOhhhh! Tracey!!!! Tracey!!!!"[3] (*Wahlert I, supra*, E035174, at p. 12.)

Police also recorded one conversation between Wahlert and his mother and another conversation with Wahlert, his mother, and an investigator, both of which were played to his jury only. During these conversations, Wahlert stated he "did it because I was scared of [Willison]. And I did it because . . . [Garrison] said she was scared of [Willison]." He told his mother that Garrison told him to kill Willison. When the investigator was present, Wahlert stated that Garrison had "used me to get this dude done" and that Garrison "set me up to do this." Following these interviews and conversations, Wahlert told the investigator that Garrison "duct taped [Willison]." (*Wahlert I, supra*, E035174, at pp. 12-13, fn. omitted.)

After Willison's death, Garrison made admissions to several others about her involvement in the killing. The night after the killing, she told Tiffany Walls that Wahlert shot a man and that she slit the victim's throat. Within a couple of days of the murder, she told Kellie White that she had repeatedly stabbed Willison and killed him. Within two weeks after the murder, Garrison told Victoria Lauderdale that a man was supposed to give her money and did not; she and Wahlert went to the man's house where she had taped the man's hands and legs while Wahlert held him; they robbed him of drugs and money; and then they took him to a field where Wahlert shot him twice. She further told Lauderdale that when she and Wahlert returned to the scene of the shooting

[3] Spelling and punctuation are as set forth in the transcripts of the audio records admitted into evidence. (*Wahlert I, supra*, E035174, at p. 12.)

and found the victim alive, Wahlert cut the man's throat. Garrison did not tell Lauderdale that she had been forced to participate in the murder. About two weeks after the murder, Garrison told Vernon Wood that she planned to rob Willison; that she bound him with duct tape and robbed him of his truck and $20; and that Wahlert then shot and stabbed him. On two occasions after Wahlert was arrested, when Ramirez and Garrison were among friends, Garrison "joke[d] around about how much she liked duct tape." (*Wahlert I*, *supra*, E035174, at pp. 13-14, fn. omitted.)

Garrison was interviewed by police again in May 2001 and December 2001. In these interviews, Garrison denied having any relationship with Wahlert. She said that Wahlert told her to duct tape Willison, but she refused. Rather than insisting upon going with Wahlert and Willison in the truck, as she previously stated, she went along only after Wahlert pointed the gun at her and said "[y]ou're going too." Garrison explained the apparent inconsistency by stating: "[Wahlert] said, 'You're going too. Let's go,' and then I don't know if he thought about it or what. But he wasn't gonna—he wasn't gonna let me go with him, and then that's when I insisted on going." She denied taking things from Willison's pockets and denied stabbing Willison. She did not try to stop Wahlert, Garrison explained, because she was afraid that he would shoot her too. At the conclusion of this last interview she was taken into custody. Audio and video recordings of these interviews were played to Garrison's jury only. Neither Wahlert nor Garrison testified at trial. (*Wahlert I*, *supra*, E035174, at p. 14, fn. omitted.)

On December 9, 2003, a jury convicted Garrison of first degree murder (§ 187, subd. (a)) and found true the allegation that she committed the murder while engaged in the commission of a robbery and kidnapping (§ 190.2, subd. (a)(17)(A) & (B)) and of knowing that a principal was armed with a gun (§ 12022, subd. (a)(1)). The jury found not true the enhancement allegation that Garrison personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)). (*Wahlert I*, *supra*, E035174, at pp. 2-3.) Garrison was sentenced to life without the possibility of parole, plus a determinate term of one year for the principal-armed enhancement.

On June 24, 2005, we affirmed the convictions, ordered victim restitution to be paid jointly and severally, and instructed the trial court to correct certain clerical errors. (*Wahlert I*, *supra*, E035174, at pp. 4-5, 41-42.) In the published portion of the opinion, we held that Wahlert's statements during the recorded conversation between himself and Garrison, to the extent they were offered for their truth against Garrison, were testimonial for purpose of the confrontation clause under *Crawford v. Washington* (2004) 541 U.S. 36, but that their admission against Garrison was harmless. In relevant part, we also concluded that any errors in failing to instruct as to accomplice principles or concerning implied malice were harmless. (*Wahlert I, supra*, E035174, at pp. 4-5.)

In 2018, after Garrison's judgment of conviction became final, the Legislature enacted and the Governor signed Senate Bill 1437, effective January 1, 2019. (See Stats. 2018, ch. 1015, § 1, subd. (f).) Senate Bill 1437 amended the felony-murder rule and the natural and probable consequences doctrine as it relates to murder. Senate Bill 1437 also

added section 1170.95, which allows those "convicted of felony murder or murder under a natural and probable consequences theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts . . . ." (§ 1170.95, subd. (a).)

On January 22, 2019, Garrison in propria persona filed a petition for resentencing pursuant to section 1170.95, requesting that her murder conviction be vacated based on changes to sections 188 and 189, as amended by Senate Bill 1437. Garrison checked the boxes stating she was not the actual killer and that the victim was not a peace officer. However, even though the section 1170.95 petition states "all must apply," Garrison did not check the boxes indicating: (1) "I did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree"; and (2) "I was not a major participant in the felony or I did not act with reckless indifference to human life during the course of the crime or felony."

The trial court heard the petition on March 22, 2019. Prior to the hearing, the court appointed a conflict-panel attorney to represent Garrison, and indicated it anticipated that counsel would simply say "I object" at the conclusion of the court's ruling. The court then indicated it had reviewed its own records and denied Garrison's petition. In denying the petition, the court stated as follows:

"There was a finding on the special circumstance. The finding reads as follows: 'We, the jury in the above-entitled action, find that the murder of Michael Wilson, as charged under Count 1 of the third amended information, was committed while the

defendant, Tracy Leean Garrison, was engaged in the commission of the crime of robbery in violation of section 211 of the Penal Code as alleged in the allegation of special circumstance within the meaning of Penal Code section 190.2, subdivision (a), subsection (17), subparagraph (A).

"Additionally, there was a second finding that reads as follows: [']We, the jury in the above-entitled action, find that the murder of Michael Wilson, as charged under Count 1 of the third amended information, was committed while the defendant, Tracy Leean Garrison, was engaged in the commission of the crime of kidnapping in violation of section 207 of the Penal Code as alleged in the allegation of special circumstance within the meaning of Penal Code section 190.2, subdivision (a), subsection (17), subparagraph (B).

"There was also a true finding on personal use of a handgun—or being personally armed with a handgun. There was also a true finding on the 12022(b) allegation.**[4]**

"The jury was instructed on aider and abettor liability. The jury was instructed pursuant to 8—under CAL JIC 8.80.1. In pertinent part, that instruction stated the following: 'If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant, with the intent to kill,

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4 Garrison correctly notes that at the hearing on her resentencing petition, the court mistakenly observed that the jury had found true the personal-use enhancement allegation under section 12022, subdivision (b)(1), when, in fact, the jury only found true the principal-armed enhancement pursuant to section 12022, subdivision (a)(1).

aided and abetted or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided and abetted or assisted in the commission of the crime of robbery or kidnapping which resulted in the death of a human being, namely Michael Wilson.'

"As such, it appears that as a matter of law, the defendant was found to fall within the provisions of [Senate Bill] 1437 as it is enacted meaning there has been a finding, as a matter of law, that she satisfies one of the predicates for aider and abettor liability under [Senate Bill] 1437 as it is drafted. As such, she is not entitled to relief. Under [section] 1170.95, the Court is summarily denying this petition."

Garrison's counsel thereafter objected. When the trial court inquired as to whether defense counsel wanted to be heard further as to her objection, counsel stated "No."

On March 25, 2019, the People filed a response, arguing Senate Bill 1437 was unconstitutional and that Garrison was not factually entitled to relief due to the jury's true findings on the felony-murder special circumstances. The People claimed that Garrison was the actual killer, and if not the actual killer, she directly aided and abetted the killing with the intent to kill, she was a major participant in the murder, and she acted with reckless indifference to human life. The People thus requested summary denial of Garrison's petition.

On April 29, 2019, Garrison filed a timely notice of appeal from the denial of her section 1170.95 petition.

III

DISCUSSION

Garrison contends the trial court erred in summarily denying her section 1170.95 petition for resentencing.

A. *Standard of Review and Applicable Law*

We review de novo questions of statutory construction. (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1041.) "Our primary task 'in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent.'" (*Ibid*.)

On September 30, 2018, the Governor signed Senate Bill 1437. "The legislation, which became effective on January 1, 2019, addresses certain aspects of California law regarding felony murder and the natural and probable consequences doctrine by amending Penal Code sections 188 and 189, as well as by adding Penal Code section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in law would affect their previously sustained convictions." (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722 (*Martinez*).)

An uncodified section of the law expressing the Legislature's findings and declarations states the law was "necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent

to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) It further provides that the legislation was needed "to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual." (*Id.*, § 1, subd. (e).)

Prior to Senate Bill 1437's enactment, a person who knowingly aided and abetted a crime, the natural and probable consequence of which was murder or attempted murder, could be convicted of not only the target crime but also of the resulting murder or attempted murder. (*People v. Chiu* (2014) 59 Cal.4th 155, 161; *In re R.G.* (2019) 35 Cal.App.5th 141, 144 (*R.G.*).) "This was true irrespective of whether the defendant harbored malice aforethought. Liability was imposed '"for the criminal harms [the defendant] . . . naturally, probably, and foreseeably put in motion." [Citations.]' [Citation.]" (*R.G.*, at p. 144.) "The purpose of the felony-murder rule [was] to deter those who commit[ted] the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony." (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.) Aider and abettor liability under the doctrine was thus "vicarious in nature." (*People v. Chiu*, at p. 164.)

Senate Bill 1437 "redefined 'malice' in section 188. Now, to be convicted of murder, a principal must act with malice aforethought; malice can no longer 'be imputed

to a person based solely on [his or her] participation in a crime.' (§ 188, subd. (a)(3).)" (*R.G., supra*, 35 Cal.App.5th at p. 144; accord, *People v. Verdugo* (2020) 44 Cal.App.5th 320, 326 (*Verdugo*), review granted Mar. 18, 2020, S260493.[5]) "Senate Bill 1437 also amended section 189, which defines first and second degree murder, by, among other things, adding subdivision (e). Under that subdivision, a participant in enumerated crimes is liable under the felony-murder doctrine only if he or she was the actual killer; or, with the intent to kill, aided and abetted the actual killer in commission of first degree murder; or was a major participant in the underlying felony and acted with reckless indifference to human life." (*People v. Munoz* (2019) 39 Cal.App.5th 738, 749; § 189, subd. (e); Stats. 2018, ch. 1015, § 3; *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1099-1100, review granted Nov. 13, 2019, S258175; *Martinez*, *supra*, 31 Cal.App.5th at p. 723; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1135 (*Lewis*), review granted Mar. 18, 2020, S260598.[6]) "Senate Bill 1437 thus ensures that murder liability is not imposed on a person who did not act with implied or express malice," or—when the felony-murder doctrine is at issue—"was not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (*People v. Munoz*, at pp. 749-750; Stats. 2018, ch. 1015, § 1,

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[5] Under a recent amendment to California Rules of Court, rule 8.1115, we may rely on *Verdugo* as persuasive authority while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

[6] As previously noted, under a recent amendment to California Rules of Court, rule 8.1115, we may rely on *Lewis* as persuasive authority while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

subds. (f), (g); *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147; *Martinez*, at p. 723.)

As noted above, Senate Bill 1437 amended section 189 to limit liability for murder under a felony-murder theory to a person who (1) was the actual killer; (2) though not the actual killer, acted "with intent to kill" and "aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer" in the commission of first degree murder; or (3) was "a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e); *Verdugo*, *supra*, 44 Cal.App.5th at p. 326.)

Senate Bill 1437 did not "alter the law regarding the criminal liability of direct aiders and abettors of murder because such persons necessarily 'know and share the murderous intent of the actual perpetrator.'" (*Lewis, supra*, 43 Cal.App.5th at p. 1135.) Accordingly, "[o]ne who directly aids and abets another who commits murder is thus liable for murder under the new law just as he or she was liable under the old law." (*Ibid*.)

Senate Bill 1437 also added section 1170.95. That section provides that "[a] person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts." (§ 1170.95, subd. (a).) A petition may be filed when the following three conditions are met: "(1) A complaint, information, or indictment was filed against the petitioner that

allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subds. (a)(1)-(3); see *Martinez*, *supra*, 31 Cal.App.5th at p. 723.)

The petitioner must declare that he or she is eligible for relief based on the requirements above, provide the case number and year of conviction, and specify whether the petitioner requests the appointment of counsel. (§ 1170.95, subd. (b)(1).) "If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information." (§ 1170.95, subd. (b)(2).)

Section 1170.95, subdivision (c), sets forth the trial court's obligations upon the submission of a complete petition: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. . . . If the petitioner makes a prima facie

showing that he or she is entitled to relief, the court shall issue an order to show cause." Once the order to show cause issues, the court must hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts. (§ 1170.95, subd. (d)(1).) At such a hearing, both the prosecution and the defense may rely on the record of conviction or may offer new or additional evidence. (§ 1170.95, subd. (d)(3).) "[T]he burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." (§ 1170.95, subd. (d)(3); *Martinez*, *supra*, 31 Cal.App.5th at pp. 723-724.)

If the petitioner is found eligible for relief, the murder conviction must be vacated and the petitioner resentenced "on any remaining counts in the same manner as if the petitioner had not been [sic] previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170.95, subd. (d)(1).) If the petitioner is found eligible for relief, but "murder was charged generically[ ] and the target offense was not charged," the petitioner's murder conviction must be "redesignated as the target offense or underlying felony for resentencing purposes." (§ 1170.95, subd. (e).)

B. *Appointment of Counsel Under Section 1170.95*

Garrison contends the trial court erred in summarily denying her petition for resentencing without appointing counsel on her behalf or ordering briefing from the parties. In essence, she claims that a facially valid petition under section 1170.95 requires the trial court to appoint counsel if requested and to order briefing before it can determine whether the petitioner has established a prima facie basis for relief. She

maintains that the trial court may not look beyond the face of the petition at this stage of inquiry, and even if the court could, the court relied on an inadequate record to support its finding in violation of her due process right. As to relief, Garrison requests that the case be remanded with orders to appoint counsel, allow briefing by the parties, and conduct an eligibility hearing.

Recent appellate court decisions have rejected similar contentions that section 1170.95, subdivision (c), mandates the appointment of counsel and briefing whenever a facially sufficient petition has been filed. (See *Lewis, supra*, 43 Cal.App.5th at pp. 1139-1140; *Verdugo, supra,* 44 Cal.App.5th at pp. 323, 328, 332-333; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 (*Cornelius*), review granted Mar. 18, 2020, S260410.) For example, the *Verdugo* court determined that subdivisions (b) and (c) of section 1170.95 together prescribe a "three-step evaluation" process before determining if an order to show cause should issue. (See *Verdugo*, at pp. 330, 332-333.) It explained that upon the filing of a section 1170.95 petition, the trial court first screens the petition to determine if it contains the basic averments required by subdivision (b)(1)(A) and (B). (See *Verdugo,* at pp. 323, 327-328.) The court may deny the petition at this stage without prejudice to refiling if the petition lacks required elements or is facially inadequate. (§ 1170.95, subd. (b)(2); *Verdugo,* at p. 328.) "This initial review thus determines the facial sufficiency of the petition." (*Verdugo,* at p. 328.)

The *Verdugo* court further explained, "Subdivision (c) then prescribes two additional court reviews before an order to show cause may issue, one made before any

briefing to determine whether the petitioner has made a prima facie showing he or she falls within section 1170.95—that is, that the petitioner may be eligible for relief—and a second after briefing by both sides to determine whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 328.) The initial prima facie review is "to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner." (*Verdugo*, at p. 329.) At this stage of review, the trial court may rely upon the petitioner's record of conviction, including the charging documents, jury instructions, verdict forms, and appellate decision, to conclusively establish ineligibility for relief. (See § 1170.95, subd. (a)(1)-(2); *Verdugo*, at p. 333; *Lewis*, *supra*, 43 Cal.App.5th at pp. 1137-1138.)

"[I]f the petitioner's ineligibility for resentencing under section 1170.95 is not established as a matter of law by the record of conviction, the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties' briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330; see § 1170.95, subd. (c).) After the second review, if the trial court concludes that the petitioner has established a prima facie basis of eligibility for resentencing, it must issue an order to show cause. (*Verdugo*, at p. 328; *Lewis*, *supra*, 43 Cal.App.5th at p. 1140.)

Garrison disagrees with the *Verdugo* court's formulation of a two-step prima facie review process and contends he was entitled to appointed counsel when he filed a facially

sufficient petition. The issue of when the right to appointed counsel arises under section 1170.95, subdivision (c), is currently before the Supreme Court in *Lewis*, *supra*, 43 Cal.App.5th 1128 [S260598], *Verdugo*, *supra*, 44 Cal.App.5th 320 [S260493], and *Cornelius*, *supra*, 44 Cal.App.5th 54 [S260410].[7]

We need not resolve this question, however, because even if section 1170.95, subdivision (c), required the trial court to appoint counsel upon the presentation of a facially valid petition, the trial court here *did* appoint counsel for Garrison. As Garrison recognizes, the trial court "made the appointment" for counsel. However, she believes the trial court did not allow "counsel to speak prior to rendering a decision, and then just allowing counsel to object to the court's ruling." Although the court rendered its decision prior to counsel's objection, there is no indication in the record to support Garrison's contention the court forbade counsel from speaking. In fact, at the conclusion of the hearing, the court specifically asked Garrison's appointed counsel if she wished to "be heard further as to [her] objection?" Counsel replied, "No."

In addition, even if section 1170.95, subdivision (c), required the trial court to appoint counsel upon the presentation of a facially valid petition, any such error in failing to do so was harmless. That is because the record conclusively establishes that she is ineligible for relief as a matter of law.

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[7] On March 18, 2020, the California Supreme Court granted review on the following questions that directly bear on Garrison's appeal: "(1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95? (2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)." (*People v. Lewis* (Mar. 18, 2020, S260598) [2020 Cal.Lexis 1946].)

It is undisputed that a jury convicted Garrison of first degree murder (§ 187, subd. (a)) while Garrison was engaged in the commission of the crimes of robbery (§ 190.2, subd. (a)(17)(A)) and kidnapping (§ 190.2, subd. (a)(17)(B)), and this court affirmed the judgment of conviction. (*Wahlert I*, *supra*, E035174, at pp. 2-5, 41-42; see *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 419 (*Gutierrez-Salazar*.)

Thus, even with the benefit of counsel, Garrison would not be able to refute the trial court's conclusion that she was convicted on a valid theory of murder which survives the changes to sections 188 and 189. Accordingly, Garrison suffered no prejudice by the trial court's failure to appoint counsel (or allow counsel to speak prior to rendering its decision) and it would be futile to remand the case for the appointment of an attorney on this record.

C. *Review of Record of Conviction*

Garrison argues the trial court erred by reviewing her record of conviction and determining the jury's true findings on the special circumstances rendered her ineligible for relief. According to Garrison, two California Supreme Court cases decided after she was convicted—*People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*)—clarified what "major participant" and "reckless indifference" to human life mean for purposes of section 190.2, subdivision (d), and therefore require us to conclude her special circumstances findings were not supported by sufficient evidence. As we explain, it is proper for a trial court to review the record of conviction when determining whether a section 1170.95 petitioner has stated a prima

facie claim for relief. Additionally, even under the principles articulated in *Banks* and *Clark* after Garrison was convicted, she undoubtedly qualifies as a major participant who acted with reckless indifference to human life, a conclusion that renders her ineligible for relief under section 1170.95.

Two opinions, *Lewis* and *Verdugo*, have already rejected the argument that a trial court is limited to the allegations in the petition when determining whether the petitioner has stated a prima facie claim for relief under section 1170.95. We find *Lewis* and *Verdugo* to be persuasive authority and correctly decided.

In *Lewis*, the defendant argued "that the court could look no further than his petition in evaluating his prima facie showing and the court therefore erred when it considered [the] opinion in his direct appeal." (*Lewis*, *supra*, 43 Cal.App.5th at p. 1137.) In *Verdugo*, the defendant argued "the superior court lacked jurisdiction to deny his section 1170.95 petition on the merits" based on its review of the record of conviction "without first appointing counsel and allowing the prosecutor and appointed counsel to brief the issue of his entitlement to relief." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 323.) Analogizing to the well-established and similar resentencing procedures under Propositions 36 and 47, the *Lewis* and *Verdugo* courts rejected these arguments, concluding a trial court may consider the record of the petitioner's conviction, including documents in the court's own file and the appellate opinion resolving the defendant's direct appeal. (*Lewis*, at pp. 1137-1138; *Verdugo*, at pp. 329-330.)

The *Lewis* court reasoned: "Allowing the trial court to consider its file and the record of conviction is also sound policy. As a respected commentator has explained: 'It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. For example, if the petition contains sufficient summary allegations that would entitle the petitioner to relief, but a review of the court file shows the petitioner was convicted of murder without instruction or argument based on the felony murder rule or [the natural and probable consequences doctrine], . . . it would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing.' (Couzens et al., Sentencing Cal. Crimes [(The Rutter Group 2019)] ¶ 23:51(H)(1), pp. 23-150 to 23-151.)" (*Lewis*, *supra*, 43 Cal.App.5th at p. 1138.) We agree with this view and therefore conclude the court did not err by considering the record of conviction in evaluating Garrison's petition.

Next, Garrison argues that even if the trial court could look beyond her petition to the record of conviction, the trial court relied on materially inadequate documents and the evidence is insufficient to support a finding that she was a major participant or acted with reckless indifference to human life under *Banks* and *Clark*. She argues that because *Banks* and *Clark* were issued after her conviction became final, no court has analyzed the sufficiency of the evidence supporting her section 190.2, subdivision (d) special

circumstance findings under the correct standard. The People assert the evidence amply supports the special circumstance findings under the principles articulated in *Banks* and *Clark*. We agree with the People.

Section 190.2 sets forth the special circumstances under which murderers and accomplices can be punished by death or life without possibility of parole. Two such circumstances are when a defendant is found guilty of first degree murder committed while the defendant was engaged in, or was an accomplice in, the commission or attempted commission of a robbery (§ 190.2, subd. (a)(17)(A)) or a kidnapping (§ 190.2, subd. (a)(17)(B)). However, as explained above, a death resulting during the commission of a robbery (or any other felony enumerated in section 189) is insufficient, on its own, to establish a felony-murder special circumstance for those defendants, like Garrison, who were not found to be the actual killer. Such defendants can only be guilty of special circumstance felony murder if they aid in the murder with the intent to kill (§ 190.2, subd. (c)), or, lacking intent to kill, aid in the felony "with reckless indifference to human life and as a major participant." (§ 190.2, subd. (d)).

Section 190.2, subdivision (d), was enacted in 1990 to bring state law into conformity with prevailing Eighth Amendment doctrine, as set out in the United States Supreme Court's decision *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*). (*Banks*, *supra*, 61 Cal.4th at p. 798.) "In *Tison*, two brothers aided an escape by bringing guns into a prison and arming two murderers, one of whom they knew had killed in the course of a previous escape attempt. After the breakout, one of the brothers flagged down a passing

car, and both fully participated in kidnapping and robbing the vehicle's occupants. Both then stood by and watched as those people were killed. The brothers made no attempt to assist the victims before, during, or after the shooting, but instead chose to assist the killers in their continuing criminal endeavors. [Citation.] The Supreme Court held the brothers could be sentenced to death despite the fact they had not actually committed the killings themselves or intended to kill, stating: '[R]eckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result. [¶] The [brothers'] own personal involvement in the crimes was not minor, but rather, . . . "substantial." Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each . . . was actively involved in every element of the kidnap[p]ing-robbery and was physically present during the entire sequence of criminal activity culminating in the murder[s] . . . and the subsequent flight. The Tisons' high level of participation in these crimes . . . implicates them in the resulting deaths.'" (*In re Ramirez* (2019) 32 Cal.App.5th 384, 393-394 (*Ramirez*), quoting *Tison*, at pp. 157-158.)

"The *Tison* court pointed to the defendant in *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*) as an example of a nonkiller convicted of murder under the felony-murder rule for whom the death penalty was unconstitutionally disproportionate. Enmund was the driver of the getaway car in an armed robbery of a dwelling whose occupants were

killed by Enmund's accomplices when they resisted. [Citations.] In deciding the Eighth Amendment to the United States Constitution forbids imposition of the death penalty 'on one such as Enmund' . . . , the high court emphasized that the focus had to be on the culpability of Enmund himself, and not on those who committed the robbery and shot the victims [citation]. 'Enmund himself did not kill or attempt to kill; and, . . . the record . . . does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. . . . [T]hus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the [victims]. This was impermissible under the Eighth Amendment.'" (*Ramirez*, *supra*, 32 Cal.App.5th at p. 394.)

In *Banks*, the California Supreme Court described what is often referred to as the *Tison-Enmund* spectrum. "At one extreme" are people like Enmund—"the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state." (*Banks*, *supra*, 61 Cal.4th at p. 800.) "At the other extreme [are] actual killers and those who attempted or intended to kill." (*Ibid*.) Section 190.2, subdivision (d), covers those people who fall "'into neither of these neat categories'"—people like the Tison brothers, who were major participants in the underlying felony and acted with a reckless indifference to human life. (*Banks*, at p. 800.)

Our high court articulated several factors intended to aid in determining whether a defendant falls into this middle category, such that section 190.2, subdivision (d), would

apply to them. "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or *using* lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant *present at the scene* of the killing, in a position to facilitate or *prevent* the actual murder, and did his or her own actions or *inaction* play a particular role in the death? What did the defendant do after lethal force was used?" (*Banks, supra,* 61 Cal.4th at p. 803, italics added.) "No one of these considerations is necessary, nor is any one of them necessarily sufficient." (*Ibid*.)

The defendant in *Banks* was convicted of first degree murder with a felony-murder special circumstance based on his having acted as the getaway driver for an armed robbery in which his codefendant Banks and others participated, and in which Banks shot and killed one of the robbery victims while escaping. (*Banks, supra,* 61 Cal.4th at pp. 796-797.) Considering the defendant's involvement in the robbery against the factors just enumerated, the Court "placed [him] at the *Enmund* pole of the *Tison-Enmund* spectrum." (*Ramirez, supra,* 32 Cal.App.5th at p. 397.) The court found particularly significant the fact the defendant played the role of getaway driver and was not aware his codefendants planned to use guns during the robbery. Because he "did not see the shooting happen, did not have reason to know it was going to happen, and could not do anything to stop the shooting or render assistance," the court concluded he was not "willingly involved in the violent manner in which the particular offense [was]

committed." (*Banks*, at pp. 801, 803, fn. 5, 807.) As a result, the court concluded "the jury's special-circumstance true finding cannot stand." (*Id*. at p. 811.)

Not long after *Banks*, our Supreme Court revisited this issue in *Clark*, also concluding the evidence was insufficient to support the defendant's robbery-murder special circumstance findings. (*Clark, supra*, 63 Cal.4th at p. 611.) The defendant in *Clark* planned a burglary of a computer store to occur after the store was closed. According to the plan, his codefendant was to carry out the burglary armed with an unloaded gun. However, his codefendant ended up carrying a gun loaded with one bullet and fired that bullet when he unexpectedly encountered a store employee, killing her. (*Id*. at pp. 612-613.) Our high court concluded there was insufficient evidence Clark acted with reckless indifference to human life because (a) Clark was not physically present when his codefendant killed the employee and was therefore unable to intervene; (b) there was no evidence Clark knew his codefendant was predisposed to be violent; and (c) Clark planned for the robbery to take place after the store closed, and the gun was not supposed to be loaded. (*Id*. at pp. 619-622.) In sum, the court believed there was "nothing in [Clark's] plan that one can point to that elevated the risk to human life beyond those risks inherent in any armed robbery." (*Id*. at p. 623.)

Garrison argues, and we agree, that in determining if she could be convicted today of first degree murder, the trial court cannot simply defer to the jury's pre-*Banks* and *Clark* factual findings that she was a major participant who acted with reckless indifference to human life as those terms were interpreted at the time. Rather, the court

must determine if substantial evidence supports the jury's finding as that standard was interpreted by our high court in *Banks* and *Clark*.

Nonetheless, we believe an appellate court is capable of determining whether a defendant's pre-*Banks* and *Clark* trial record is sufficient to support the special circumstances finding under the guidance articulated in those cases. As the court stated in *In re Miller* (2017) 14 Cal.App.5th 960 (*Miller*), "[a] [d]efendant's claim that the evidence presented against him failed to support [a] robbery-murder special circumstance [finding made prior to *Banks* and *Clark*] . . . is not a 'routine' claim of insufficient evidence." (*Id*. at pp. 979-980.) The "claim does not require resolution of disputed facts; the facts are a given." (*Id*. at p. 980.) As the *People v. Torres* (2020) 46 Cal.App.5th 1168 court observed, "[t]he question is whether [those given facts] are *legally sufficient* in light of *Banks* and *Clark*." (*Id*. at p. 1179, italics added.) Rather than remand for the trial court to make that determination, we will do so now.

In our view, the most significant facts in *Banks* and *Clark* were that the defendants in those cases were not present at the scene of the robberies (and therefore could not intervene or try to minimize the violence), did not know guns would be used, and certainly did not use any guns themselves in fulfilling their roles in the crime. Those facts supported the inference that the defendants were not willingly involved in the violent manner in which the robberies were committed.

Garrison, in contrast, was willingly involved in the violent manner of the robbery and kidnapping. She talked to Ramirez about a plan to rob the victim on several occasions, and Wahlert and Garrison sometimes referred to each other as "Bonnie and Clyde." (*Wahlert I*, *supra*, E035174, at p. 5.) Furthermore, while the victim was at Ramirez's home, Garrison and Wahlert not only entered Ramirez's home at a time when most residents would be home asleep (therefore increasing the risk of violence) but they did so armed with duct tape, a gun, and a knife. Wahlert then proceeded to pull out a gun and point it at the victim, while Garrison taped the victim's mouth and hands with the duct tape. (*Wahlert I*, *supra*, E035174, at pp. 5-6.) Garrison went through the victim's pockets, taking keys, a wallet, a necklace, and a ring. Ramirez pleaded for them to not shoot the victim at his home and believed Wahlert and Garrison were "working together." (*Wahlert I*, *supra*, E035174, at p. 6.)

Garrison took the victim's keys, and with Wahlert pointing the gun at the victim, the three then entered the victim's truck. They then drove to a secluded rural area where the victim was severely beaten, repeatedly stabbed, and shot twice in the head. (*Wahlert I*, *supra*, E035174, at p. 6.) After the killing and Wahlert's unrelated arrest for brandishing a firearm, Garrison went to Ramirez's home and told him that they had to "go back out there and take care of the body." (*Wahlert I*, *supra*, E035174, at pp. 7-8.) Moreover, after the victim's death, Garrison made admissions to several other people about her involvement in the killing. On the night after the killing, she told a person that Wahlert shot a man and that she slit the victim's throat. She also told another person,

within a couple days of the murder, that she had repeatedly stabbed the victim and killed him. (*Wahlert I, supra*, E035174, at p. 13.) There was also evidence at trial indicating Garrison encouraged Wahlert to kill the victim. (*Wahlert I, supra*, E035174, at pp. 11-12.) Even if the personal use of a deadly weapon allegation against Garrison was found not true by the jury, there was sufficient evidence in the record to conclude Garrison was a major participant in the robbery and kidnapping of the victim and watched without intervening when Wahlert killed the victim. There was also sufficient evidence to find Garrison intended to kill the victim, aided, abetted, counseled, commanded, induced, or assisted Wahlert in the commission of the murder. Garrison could have tried to stop Wahlert's violent behavior or help the victim once he had been kidnapped and shot, but she did neither.

Garrison's conduct easily meets our state's standard for what constitutes being a major participant who acted with reckless indifference to human life. Indeed, we are not aware of a single case that suggests a defendant who personally committed a robbery and kidnapping, used duct tape and a weapon, and was present for the shooting did not meet the standard in section 190.2, subdivision (d). The defendants who have been successful in petitioning for a writ of habeas corpus to have their special circumstance findings vacated under *Banks* and *Clark* are those who were not wielding guns or weapons themselves and were not present for the shooting (either because they were acting as getaway drivers or because they were involved in the planning of the crime only). (See, e.g., *Miller, supra,* 14 Cal.App.5th at p. 965 [defendant played the role of "spotter" who

would select the robbery target and was not at the scene of the robbery/murder]; *In re Bennett* (2018) 26 Cal.App.5th 1002, 1019-1020 [defendant was involved in planning the robbery but was not at the scene of the murder]; *Ramirez*, *supra*, 32 Cal.App.5th at p. 404 [defendant acted as getaway driver and was not at the scene of the murder]; *In re Taylor* (2019) 34 Cal.App.5th 543, 559 [same].) Garrison's conduct is clearly distinguishable.

We therefore conclude that while the trial court erred by failing to determine whether Garrison qualified as a major participant who acted with reckless indifference to human life under *Banks* and *Clark*, the error was harmless because the record demonstrates the answer to that question is yes. As a result, we conclude the denial of Garrison's petition was proper. (See *Gutierrez-Salazar*, *supra*, 38 Cal.App.5th at p. 419; *People v. Gonzalez* (2018) 5 Cal.5th 186, 202 ["The special circumstance instructions also required the jury to find that each aider and abettor either intended to kill or (1) began participating in the crime before or during the killing, (2) was a major participant in the crime, and (3) acted with reckless indifference to human life."]; see also CALJIC No. 8.80.1 [a defendant must have an intent to kill or be a major participant with a reckless disregard for human life to find her guilty when a special circumstance is charged and there is evidence that the defendant was not the killer].)

IV

DISPOSITION

The trial court's postjudgment order denying Garrison's section 1170.95 resentencing petition is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

MILLER
Acting P. J.

FIELDS
J.